85 No. 1095

Supreme Court, U.S.
FILED
DEC 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OF AMERICA

October Term 1985

NORMAN O. AAMODT and MAJORIE M. AAMODT

vs.

UNITED STATES NUCLEAR REGULATORY COMMISSION, NUNZIO J. PALLADINO, CHAIRMAN, and UNITED STATES OF AMERICA,

Respondents

METROPOLITAN EDISON CO., JERSEY CENTRAL POWER & LIGHT CO., PENNA. ELECTRIC CO., and GPU NUCLEAR CORP.,

Intervenors

On Writ of Certiorari to The United States Court of Appeals for the Third Circuit (Appeal Nos. 85-3301, 85-3302, 85-3310, 85-3315)

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

WERE PETITIONERS DENIED THEIR CONSTITUTIONAL RIGHT TO PROCEDURAL DUE PROCESS BY THE NUCLEAR REGULATORY COMMISSION'S FAILURE TO HOLD A HEARING ON THE AAMODTS' HEALTH STUDY AND THE HARTMAN ALLEGATIONS?

DID THE NUCLEAR REGULATORY COMMISSION FAIL TO ADEQUATELY CONSIDER THE EVIDENCE PRESENTED IN THE AAMODTS' HEALTH STUDY IN DETERMINING THAT NO NEW ENVIRONMENTAL IMPACT STATEMENT WOULD BE REQUIRED BEFORE THE RESTART OF UNIT-1?

DID THE NUCLEAR REGULATORY COMMISSION AND THE COURT OF APPEALS AVOID REQUIRING ADJUDICATORY HEARINGS ON ALL OUTSTANDING ISSUES BY THE SEMANTIC DEVICE OF NOT DECLARING THE RESTART PROCEDURE A LICENSE AMENDMENT PROCEDURE?

DID THE COURT OF APPEALS ERR IN GIVING TOO MUCH DEFERENCE TO THE NUCLEAR REGULATORY COMMISSION IN FINDING THAT THE COMMISSION'S REFUSAL TO REOPEN THE RECORD TO INCLUDE THE AAMODTS' HEALTH STUDY, AND THE HARTMAN ALLEGATIONS DID NOT CONSTITUTE AN ABUSE OF THE COMMISSION'S DISCRETION?

WHAT IS THE CORRECT STANDARD OF JUDICIAL REVIEW IN CASES WHERE AN ADMINISTRATIVE AGENCY DEPARTS FROM LONGSTANDING AGENCY RULES ENACTED TO COMPORT WITH CONSTITUTIONAL REQUIREMENTS OF PROCEDURAL DUE PROCESS?

LIST OF ALL PARTIES

NORMAN O. AAMODT and MARJORIE M. AAMODT,
Petitioner

vs.

UNITED STATES NUCLEAR REGULATORY COMMISSION, NUNZIO J. PALLADINO, CHAIRMAN, and UNITED STATES OF AMERICA,
Respondents

METROPOLITAN EDISON CO., JERSEY CENTRAL POWER & LIGHT CO., PENNA. ELECTRIC CO., AND GPU NUCLEAR CORP.,
Intervenors

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IV. OFFICIAL AND UNOFFICIAL REPORTS

THE OPINIONS DELIVERED IN THE COURTS OR ADMINISTRATIVE AGENCY BELOW WERE:

1. *Three Mile Island Alert, Inc., et al. v. United States Nuclear Regulatory Commission*, Nos. 85-3301, 85-3302, 85-3310 and 85-3315 (3rd Cir. Aug. 27, 1985)

2. *In the Matter of Metropolitan Edison Co.*, (Three Mile Island Nuclear State, Unit No. 1) CLI-85-09 (May 29, 1985)

V. JURISDICTIONAL STATEMENT

The date of the Third Circuit's Opinion in *TMIA, et al. v. United States Nuclear Regulatory Commission, et al.* was August 27, 1985. The date of the order denying rehearing was September 19, 1985

The jurisdiction of this Court to review this case on petition for certiorari rests upon 28 U.S.C. Sec. 1254(1).

VI. CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. 14th Amendment, Sec. 1

2. 42 U.S.C. Sec. 4331

3. 42 U.S.C. Sec. 4332

4. 42 U.S.CA. Sec. 2239

5. 5 U.S.C.S. Sec. 554

6. 5 U.S.C.S. Sec. 704

STATEMENT OF THE CASE

The accident at Three Mile Island (hereinafter "TMI") began just after 4 a.m. on March 28, 1979. Although initially the true nature of the accident was not disclosed to the public by Metropolitan Edison Co., [1] the TMI residents discovered the severity of the situation when Pennsylvania Governor Richard Thornburgh, issued an advisory, recommending that pregnant women and preschool-aged children evacuate the area. Due to the questionable practices carried on by the Licensee, and the arbitrary manner in which the Nuclear Regulatory Commission (hereinafter "NRC") has dealt with this case, no one truly knows the full extent of the damage caused by the accident.

The Aamodts have been involved in the search for what actually happened at TMI. On November 30, 1979, the Aamodts raised the issue of the necessity of conducting an Environmental Impact Statement (hereinafter "EIS"), to consider the damage done by the accident in releasing a radioactive plume, and the effect of restarting Unit-1 prior to determining the effect of the release of high levels of radiation. See *Appendix* "D".

On June 21, 1984, the Aamodts released their Health study which formed the basis of the evidence which supported their later motions to reopen the record on TMI-1 restart proceedings. See *Appendix* "E". The Aamodts asserted that large amounts of radiation had escaped during the accident and passed undetected through windows in Licensee's radiation detection grid. These radiation plumes were emitted from TMI Unit-2 between 4:00 and 7:00 a.m., when the accident occurred and before any reliable data on the accident existed. This

1. Metropolitan Edison was the original operator of TMI, this corporation has since gone through reorganization and GPU Nuclear now operates TMI. For the sake of convenience, all TMI management corporations past and present will hereinafter be referred to as "licensee".

was due primarily to Licensee's inexcusable destruction of records and their false claim of offsite radiation surveillance shortly after the accident. In addition, their subsequent positioning of their radiation detectors was inadequate, along with the use of inadequate detectors. The Aamodts studied the population residing on three hill-top roads, in what the Aamodts believed to be the paths followed by the radiation plumes on the morning of the accident. Their study included affidavits describing symptoms of radiation exposure experienced during the first few days of the accident, as well as flora abnormalities in the area. This highly focused study revealed, among other things, that cancer mortalities were at least seven times more prevalent than the expected number for that area.

One June 21, 1984, the Aamodts submitted to the NRC a motion requesting that the Commission investigate the possibility that radiation releases during the 1979 accident at TMI were significantly greater than had been reported by the Licensee. *Aamodt Motions for Investigation of Licensee's Reports of Radioactive Releases During the Initial Days of the TMI-2 Accident and Postponement of Restart Decision Pending Resolution of the Investigation*. While the primary purpose of the motion was to resolve issues of management integrity, it also sought to notify the Commission of evidence that the surrounding population and natural environment had been exposed to large amounts of radiation. The implications of the Aamodts' Health Study should have been obvious to the Commission. If members of the population did actually suffer severe radiation exposure, this meant that more radiation than previously reported was released and that subsequent health effects such as cancer and fetal abnormalities would be expected. Also, if the surrounding population and environment had already been exposed to dangerous levels of radiation, then the cumulative effects of the inevitable and admitted further

radiation releases from the restart of TMI-1 could be significantly detrimental to the health of TMI area residents. Furthermore, if during the accident the radiation releases had been as high as the Aamodts claimed, then the equipment and methods which Licensee used to measure these releases, were, and may continue to be, totally inadequate.

The NRC failed to respond to the Aamodts' motion of June 21, until a public meeting on August 15, 1984, in which the NRC determined that the Aamodts' data should be independently verified. It asked the Aamodts to choose an agency or individual to independently verify their data. The Aamodts contacted Dr. John Cobb, the principal Environmental Protection Agency investigator of the effects of radiation on the population surrounding the Rocky Flats nuclear weapons plant in Colorado. The Commission failed to respond to the Aamodts' suggestion.

The only response the Commission took regarding the Aamodts' motion was to send a copy, missing half its pages, to the Center for Disease Control, [hereinafter "CDC"] for a review of the Aamodts' methodology. The CDC conducted only a perfunctory review of the Aamodts' Health Study and responded with several questions concerning the Aamodts' methodology. The NRC did not make these comments available to the Aamodts until after the NRC had issued its decision on their motion. The author of the CDC response later wrote in a separate letter to Dr. Bruce Molholt, a Philadelphia biogeneticist, that if all the deaths claimed in the Aamodt Health Study were confirmed by medical records, then this would constitute a "statistically significant increase." See correspondence between Dr. Caldwell and Dr. Molholt (January 7, 1985) (See record below). Instead of investigating the health aspects raised in the Aamodts motion, the NRC merely accepted the contention of the NRC staff that allegations of health effects as a result of the accident at TMI-2, had been "found to be

without merit". Order CLI-84-22, 20 NRC 1573, December 13, 1984.

The NRC arbitrarily failed to respond to the Aamodt's Health Study when it concluded that no more than one excess fatal cancer over the lifetimes of a population of 2,100,000 within a 50 mile radius of TMI would result from the accident. CLI-84-22. The Aamodts brought forth proof that there were at least 15 excess cancer deaths in only five years among a sample population of 450 persons.

On January 15, 1985, the Aamodts moved for reconsideration of the NRC's denial of their earlier motion, in part because of the verified excess cancer mortality rate,[2] new evidence of the relationship of neo-natal hypothyroidism to the accident and new evidence of GPU's falsification of radiation surveillance. *Aamodt Motion for Reconsideration of Commission Order CLI-84-22 and Opening of a Hearing.* While this motion was pending, the NRC arbitrarily ordered that no further hearings would take place prior to a decision on the restart of TMI Unit-1. CLI-85-2, 21 NRC 282 (1985). Nevertheless, on March 6, 1985 and again on April 13, 1985, the Aamodts supplemented their January 15 motion, to include inquiries as to the questionable radiation surveillance of GPU and the critical health issues. The Aamodts supplied the Commission with evidence of the verified cancer death diagnoses that exceeded the expected number. They also supplied them with evidence that the dramatic post-accident incidence in neo-natal hypothyroidism could not be dismissed as unrelated to the TMI accident as had been done in the hearing, since the rate fell to expected levels in 1981-3. Related to this matter, the Aamodts raised the issue that the NRC failed to properly investigate possible iodine pathways in the

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2. TMIA Public Health Fund had verified these excess deaths, *See Critique of Center for Disease Control* (CDC) Exhibit "G" at 203.

local milk supply. See Appendix "F". The Aamodts supplied evidence that the Licensee had falsely claimed to have performed radiation surveillance on the first morning of the 1979 accident. *See Aamodts' Motion for Reconsideration of Commission Order CLI-84-22 and Opening of a Hearing.* The NRC arbitrarily failed to address these issues in its order of May 16, 1985, holding: (1) that health effects resulting from the TMI-2 accident were not relevant to the restart proceeding; (2) that the issue had not been raised in a timely manner; and (3) that allegations concerning the Licensee's deception with respect to early radiation surveillance were without foundation. Order CLI-85-08, 21 NRC 1111 (1985).

To arrive at this result, the Commission arbitrarily determined that too little radiation escaped to have caused the cited health effects. This conclusion completely ignores the more logical implication that the data relied upon by the NRC might be wholly inaccurate.

The May 16 order also failed to recognize the connection between the accident at TMI-2 and the restart proceedings. If the Aamodts' data actually represents the true picture as to the amount of radiation released during the accident, then TMI area residents may already have been exposed to unsafe doses of radiation. Since radiation is routinely released during the course of the normal operation of a nuclear reactor, and since radiation exposure is cumulative, the health damage to the population could be greatly magnified by restart of Unit-1. This should have required the filing of a new EIS.[3]

On May 22, 1985, the Aamodts rebutted the NRC's assertions. The Aamodts produced two witnesses who criticized (1) the Licensee's withholding of appropriate

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3. In denying the Aamodts' January 15 motion to reopen the record, the Commission relied on agency guidelines which violated the Atomic Energy Act and constituted arbitrary and capricious behavior worthy of judicial intervention under the Administrative Procedures Act.

radiation detection equipment for measuring highly dangerous transuranics within the damaged reactor during the month following the accident, (2), the inadequacy of the NRC's soil sampling techniques used to determine the extent of the radiation released from the accident; and (3) the pregnancy outcome studies performed by the Pennsylvania Department of Health which claimed no adverse impact from the accident. The Aamodts also presented the Commission with a report prepared for the Department of Energy, which demonstrated the continued presence of transuranics in the air of the auxiliary building in late 1980, providing further proof of the release of dangerous transuranics into the environment during the accident. *Characterization of Aerosal Sample from Three Mile Island Reactor Auxiliary Building*, G.M. Kanapilly. The auxillary building is acknowledged to have a number of leakage paths to the environment. The Commission arbitrarily failed to respond to this information and entered its May 29, 1985 decision (CL-85-09, 21 NRC 1118 (1985)) on allowing the restart of TMI-1 without any reference to the health concerns so abundantly presented by the Aamodts.

The Aamodts had earlier raised the Hartman issue, the matter of extensive leak rate falsifications at TMI Unit 2. On August 31, 1983 the Atomic Safety and Licensing Appeal Board granted the Aamodt's motion of April 16, 1983 on this issue. The NRC Commission stayed this order and ultimately denied a hearing. The Aamodt's position has been fully represented in the arguments of Judge Adams' dissenting opinion.

Petitioners[4] immediately sought review of the

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4. Other petitioners in the consolidated proceeding below were: Commonwealth of Pennsylvania, Union of Concerned Scientists, and Three Mile Island Alert, Inc. (hereinafter "TMIA"). Interveners were: Metropolitan Edison Co., Jersey Central Power and Light Co., Penna. Electric Co., and GPU Nuclear Corp. (hereinafter Licensee).

Commission's decision in the United States Court of Appeals for the Third Circuit. Petitioners sought an injunction prohibiting the NRC from authorizing the operation of TMI-1 until hearings had been completed on the outstanding issues of management integrity and the related health effects raised by the Aamodts. On May 31, 1985, petitioners filed an Emergency Motion for Stay Pending Review, which the Court of Appeals granted on June 7, 1985. Jurisdiction for petitioners motion was based upon 28 U.S.C. Sec. 2344.

On August 27, 1985, in a 2-1 decision, (Judge Adams dissenting), the Court of Appeals denied the petitions for review, affirming the May 29, 1985 order by the NRC. On August 29, 1985, the Court of Appeals continued the stay order of June 7, 1985, pending timely filed petitions for rehearing. On September 19, 1985 the Court of Appeals denied petitions for rehearing and ordered that the June 7, 1985 stay order would remain in effect until September 25, 1985, at 4:00 p.m., pending an appeal to the United States Supreme Court. On September 25, 1985, Justice Brennan granted TMI's motion for stay pending application for a writ of certiorari until the motion for stay could be reviewed by the full Court. On October 2, 1985, the United States Supreme Court denied petitions for stay pending application for a writ of certiorari.

WERE PETITIONERS DENIED THEIR CONSTITUTIONAL RIGHT TO PROCEDURAL DUE PROCESS BY THE NUCLEAR REGULATORY COMMISSION'S FAILURE TO HOLD A HEARING ON THE AAMODTS' HEALTH STUDY AND THE HARTMAN ALLEGATIONS?

This case represents the ability of an agency to ensure the safety of a population living near a nuclear reactor and the agency's ability to act within the established procedures of due process. Nuclear power

has been controversial since its inception. This controversy requires public hearings on every material issue of safety brought before the NRC. Public hearings must be held in order to fully inform the public as to all the inherent dangers of nuclear power. However, in the instant case, the NRC arbitrarily refuses to reopen the record on such crucial safety issues as leak rate falsification, TMI-2 accident related health problems and proofs of unmonitored radiation release.

The true test of whether a system of rules and regulations actually works to protect those whom it is dedicated to protect, arises in the context of a crisis. Through a crisis, which pushes the legal and regulatory systems to their respective limits, we discover whether or not the system actually works. TMI represents an opportunity to explore the constitutional limits of procedural due process. In analyzing the present case, this Court would also explore the limits of an independent Federal agency's ability to act without regard to its established procedures or the constitutionally guaranteed rights of procedural due process.

The NRC has disregarded their own procedural rules since the beginning of this crisis.[5] Instead, the NRC has contrived a hybrid procedure which fails to resolve the pressing issues presented in this case, through open adjudication or through its investigative process. The end result is that this hybridized procedure utterly fails to meet the constitutionally prescribed rights of procedural due process.

> It is well settled that; "(t)he fundamental requisite of due process of law is the opportunity to be

5. By imposing the 1979 shutdown order, the NRC violated their own procedures in this matter. The NRC requires that a hearing must be held on the shutdown order before initiating a shutdown of a nuclear reactor. Instead of following this logical procedure, the NRC arbitrarily ordered Unit-1 shutdown without a hearing. This arbitrary disregard for their own procedures has been indicative of the NRC's actions in this case.

> heard." *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965).
>
> *Goldberg v. Kelly*, 397, U.S. 254, 267 (1970).

While petitioners have been granted an opportunity to be heard on certain issues, the NRC's arbitrary decision not to hold a hearing on the Aamodts' Health Study and the Hartman allegations certainly denies petitioners any "meaningful" opportunity to be heard on these particular issues. Petitioners recognize that there exists:

> [N]o across-the-board constitutional right to oral argument in every proceeding regardless of its nature. While the line dividing them may not always be a bright one, these decisions represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.

United States v. Florida East Coast R. Co., 410 U.S. 224, 245 (1973), citing *FCC v. WJR*, 337 U.S. 265 (1949)

The instant case clearly falls within the latter category of "disputed facts in particular cases". This has always been a special case. Although the NRC has held hearings on the overall issue of the restart license, the NRC arbitrarily failed to adjudicate the important factual issues of the health issues delineated by the Aamodts and the Hartmann allegations. If the NRC, or any other administrative agency, may decide, strictly on its own initiative on which issues to hold adjudicative hearings, then the entire system of administrative law could quickly degenerate and exceed the bounds of the constitutionally guaranteed right to procedural due process. And, if the NRC may ignore hearing requirements on

these vital issues merely because the Commission feels that the weight of the record is becoming too great, then where will this arbitrary line be drawn in the future?

In fact, this Court supported a broad hearing right in *Goldberg v. Kelly*, 397 U.S. at 270, where it stated that, "in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." (*See also, United States v. Raddatz*, 447 U.S. 667 (1980) (Marshall dissenting) (requirement that decisions be based on hearings from live people, not just the written record)) *E.g., ICC v. Louisville & N.R. Co.*, 227 U.S. 88, 33 S.Ct. 185, 187-188, 57 L.Ed. 431 (1913); *Wilner v. Committee on Character & Fitness*, 373 U.S. 96, 103-104, 83 S.Ct. 1175, 1180-1181, 10 L.Ed.2d 224 (1963).

The rights of confrontation and cross examination apply in all types of cases where administrative actions come under judicial scrutiny. The ability of the decision-maker in an administrative procedure to fully and fairly determine the full scope of the problem requires that a hearing be held on the issue in question. This court has often proclaimed the fundamental importance of an adjudicatory hearing, "[p]articularly where credibility and veracity are at issue . . . written submissions are a wholly unsatisfactory basis for a decision." *Goldberg v. Kelly*, 397 U.S. at 270.

In the instant case, the primary problem has been the credibility of the Licensee. The Aamodts' Health Study and the Hartman Allegations, both focus upon a fundamental concern as to whether the Licensee has been forthright and honest about certain crucial health and safety issues. Given the Licensee's proven past instances of hiding the truth, it is of paramount importance that these issues be resolved in an adjudicatory process. Written submissions do not afford petitioners the flexibility of oral presentations, in which the full ramifications of these issues can be satisfactorily explored. A full

adjudicatory hearing must be required to insure that every issue has been fully and fairly resolved in this most important decision for the TMI area residents.

The importance of the hearing requirement also extends to the manner in which evidence is adduced by the administrative agency; *post hoc* rationalizations cannot be allowed to sustain any administrative agency's decision. "The decisionmakers conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing." *Goldberg v. Kelly*, 397 U.S. at 272 citing *Ohio Bell Tel. v. PUC*, 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093 (1937); *United States v. Abilene & S.R. Co.*, 265 U.S. 274, 288-289, 44 St.Ct. 565, 569-570, 68 L.Ed. 1016 (1924).

This Court has clearly shown that substantive administrative decisions must rest on information adduced at a hearing. If non-hearing evidence is allowed to substantially alter the decision-maker's ruling, then the affected party should possess the right to fully examine that evidence in a fair hearing. Without a hearing on the issues of the Aamodt's Health Study, and the Hartman Allegations, petitioners were unable to adequately mold their arguments to the issues presented in order to further explore, with the Commission, the true value of these reports.

Other courts have commented on the importance of hearings in order for the administrative agency to arrive at the correct decision.

> Even where the reviewing court is informed of the specific information upon which reliance was placed, a barrier to the effective judicial review remains: absence of any adversarial comment among the parties. Our cases make clear the importance of such comment in allowing a court to review the action taken by the agency as well as in facilitating informed agency decision-making itself. Thus, we have required information in agency files or reports

> identified by the agency as relevant to the proceeding to be disclosed to the parties for adversarial comment *See Portland Cement Ass'n v. Ruckelhaus*, 158 U.S. App. D.C. 308, 326-327, 486 F.2d 375, 393-394 (1973), *cert. denied*, 417 U.S. 921, 94 S.Ct. 2628, 41 L.Ed.2d 226 (1974)

United States Lines, Inc. v. Federal Maritime Comm., 584 F.2d 519, 534 (1st Cir. 1978).

A further benefit of holding an adjudicatory hearing in the instant case would be to cure other glaring gaps in the formal adjudicatory record. Contrary to what the Commission promised, it would do when initiating the proceedings, much of the information relied on by the Commission has never been the subject of a formal administrative hearing. And, while reams of information have been provided to the Commission, certain issues, such as the Aamodts' Health Study and the Hartman Allegations, have never had an adjudicatory hearing before the Commission. Written comments on these reports, dealing with factual issues of vital importance and fundamental questions as to the integrity of the licensee, hardly serve as an adequate substitute for the expansive analysis these issues would receive in a hearing.

The Administrative Procedures Act [hereinafter "APA"] clearly requires that a full hearing be held before restart could begin. However, the Third Circuit inexcusably failed to reach the question as to whether Sec. 189(a) of the Atomic Energy Act [hereinafter "AEA"] requires adjudication of this case. *See TMIA v. USNRC* Nos. 85-3301, 85-3302, 85-3310, 85-3315 slip op. at 24, n.14. (3rd Cir. August 27, 1985). The APA specifies the procedure followed "in every case of adjudication required by statutes to be determined on the record after opportunity for an agency hearing." 5 U.S.C. Sec. 554. The NRC found, and the Third Circuit agreed, that since the restart proceedings do not fall within the meaning of

Sec. 189(a), no hearings were required. If the Third Circuit had correctly found that the 155 new conditions imposed upon the license constituted a license amendment proceeding and not an enforcement proceeding, then the AEA would apply requiring the NRC to reopen the record "upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as party to such proceeding." AEA Sec. 189(a).[6]

The Commission's refusal to hold hearings on these vital safety questions before allowing restart of TMI-1, have severly harmed any remaining public confidence in the NRC's ability to guarantee the safe operation of TMI-1. By its arbitrary actions, the Commission has caused needless distress to the TMI area residents. Having endured the worst nuclear power plant accident, these people deserve nothing less than a full and public inquiry into every safety issue raised before the Commission.

In effect, petitioners' constitutionaliy guaranteed right to procedural due process has been violated by the NRC's arbitrary actions in denying them their right to an adjudicatory hearing on the vital health and safety issues raised by the Aamodts' Health Study and the Hartman Allegations.

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6. The legislative history of the APA clearly shows that public hearings on the issues presently before this Court would have been required by Congress. "Matters of great import or those where the public submission of facts will be either useful to the agency or a protection of the public, should naturally be accorded more elaborate public procedures." S.Rep. No. 752, 79th Cong., 1st Sess., 14-15 (1945)

DID THE NUCLEAR REGULATORY AGENCY FAIL TO ADEQUA[illegible]CONSIDER THE EVIDENCE PRESENTED [illegible].E AAMODTS' HEALTH STUDY IN DETERMINING THAT NO NEW ENVIRONMENTAL IMPACT STATEMENT WOULD BE REQUIRED BEFORE THE RESTART OF UNIT-1?

The environmental impact statement [hereinafter "EIS"] prepared before the original licensing of Units 1 and 2 in accordance with the National Environmental Protection Act of 1969, [hereinafter "NEPA"] Sec 2 *et seq.*, 42 U.S.C.A. sec. 4321 *et seq.*, found no significant problems. That situation has changed dramatically since the accident at Unit-2. The verified data presented in the Aamodts's Health Study requires that the NRC produce a new EIS.

Section 102(c) of the NEPA, requires all agencies of the Federal Government to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action . . ."

The NRC failed to conduct this required EIS before allowing the restart of Unit-1. Instead, the NRC staff prepared an environmental impact assessment [hereinafter "EIA"] to determine whether a full EIS would be required before TMI-1 could be permitted to renew operations. The NRC's Licensing Board found the EIA adequate, therefore, no EIS would be required before allowing restart of Unit-1. However, in assessing the environmental impact of allowing Unit-1 to recommence operations, the NRC failed to adequately consider the serious health risks presented by the Aamodts' Health Study.

All parties agree that affects on human health can be cognizable under the NEPA. This Court had previously

found that the NEPA did not require consideration in an EIS for the psychological health damage to TMI area residents. *Metropolitan Edison Co., v. People Against Nuclear Energy*, ____U.S. ____, 103 S.Ct. 1556 (1983). [hereinafter "PANE"]. However, the Aamodts's Health Study does not deal with the psychological impact of the restart of Unit-1, but rather with verifiable health damage suffered by TMI area residents as a result of the accident at Unit-2, and what dangers are entailed for affected individuals in the restart of Unit-1.[7] The Aamodts Health Study proved that more radiation was released from Unit-2 during the accident than was admitted by GPU, or the NRC. Since adverse human health effects from radiation exposure are cumulative, the restart of Unit-1, with its normal release of low level

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7. The *PANE* case did not consider the questions of damage to the physical health of the population near TMI, therefore, the question presented here is not moot. This Court in *PANE* dealt with only the narrow issue of whether the NEPA required an examination of the possibility of psychological harm to human health with the restart of Unit-1. The instant case seeks to have this Court require the NRC to consider the physical human health aspects of the restart of Unit-1 through the EIS process. In *PANE* , this Court held that a close nexus must exist between the "major Federal action" and the physical environment. It is just such a nexus between the restart of Unit-1 and the adverse impact on human health that the NRC arbitrarily refuses to explore in an EIS.

The other point with which the instant case must distinguish itself from the holding in *PANE* , arises in connection with this Court's statement that the "NEPA is not directed at the effects of past accidents and does not create a remedial scheme for past federal actions. It was enacted to require agencies to assess the future effects of future actions." *PANE* , ____U.S. ____, 103 S.Ct. at 1563. The instant case does not seek to remedy past federal actions involving TMI. Petitioners merely request that the NRC be required to properly examine the evidence of the effects of the accident at Unit-2, with the future effects which the operation of Unit-1 will have on the health of TMI area residents, especially those exposed to undetected high levels of radiation during the early hours of the accident.

radiation, would have a recognizable adverse environmental impact upon the physical health of TMI area residents requiring a new EIS.

One of the primary "criteria for determining the adequacy of an EIS . . . [is] whether the agency in good faith objectively has taken a hard look at the environmental consequences of a proposed action. *Isle of Hope Historical Assn., Inc. v. United States Army Corps of Engineers*, 646 F.2d 215, 220 (5th Cir. 1981) (per curiam) (adopting opinion of district court). In the instant case, the NRC failed to make a "good faith" examination of the amassed evidence of adverse environmental impact as a result of the accident at Unit-2, and the possibility of further damage as a result of the restart of Unit-1. Using the Aamodts' Health Study as an example, Petitioners highlight the arbitrary manner in which the NRC failed in its duty to adequately examine the possible adverse health affects of the restart of Unit-1.

Theses problems, and numerous other examples of procedural irregularities clearly show the lack of good faith investigation by the NRC as to environmental problems associated with the EIS. The NRC arbitrarily ignored any evidence which would tend to show that more radiation was released than was claimed by the dubious data provided by the Licensee. When an agency decision is based upon conclusions in an EIS which are not arrived at in good faith or in a rational and reasoned manner, that decision is necessarily arbitrary. *Sierra Club v. United States Army Corps of Engineers* , 701 F.2d 1011, 1033 (2nd Cir. 1983). The lack of good faith by the NRC, combined with other examples of procedural irregularities requires that the NRC initiate an EIS, to determine the environmental impact on the TMI area residents with the restart of Unit-1.

The Third Circuit also gave too much deference to the NRC's position in arbitrarily refusing to conduct an EIS. "The purpose of judicial review under NEPA is to

ensure the procedural integrity of the agency's consideration of environmental factors in the EIS. . . ." *Sierra Club v. Sigler*, 695 F.2d 957, 966 (5th Cir. 1983). The Third Circuit abdicated that judicial responsibility by refusing to consider the adequacy of the EIS, and the procedural abnormalities used by the NRC in reaching its decision not to require a new EIS before allowing Unit-1 to restart operations.

There is no question that a new EIS would be required if more than *de minimis* amounts of radiation escaped during the TMI Accident. The Aamodt study fundamentally challenges prior assumptions about amounts released, it does so by legitimately looking at health effects and drawing conclusions about exposures to radiation, and hence releases of radiation. Prior studies — conducted before the running of the latency period for health efforts to appear — were based on admittedly inadequate release measurements. This powerful and challenging new information by the Aamodts, which if true, undeniably would trigger a new EIS. However, this was *ignored* by the NRC because it did not comport with prior information and, thus, was not credible. On this approach, no new information would ever be credible, and the EIS requirements would be rendered a nullity by admistratively faited myopia.

DID THE NRC AND THE COURT OF APPEALS AVOID REQUIRING ADJUDICATORY HEARINGS ON ALL THE OUTSTANDING ISSUES BY THE SEMANTIC DEVICE OF NOT DECLARING THE RESTART PROCEDURE A LICENSE AMENDMENT PROCEDURE?

The NRC and the majority of the Third Circuit panel refuses to concede that the 155 newly imposed conditions on Licensee's operating license constitutes a de facto license amendment. *See TMIA v. USNRC* Nos. 85-3301, 85-3302, 85-3310, 85-3315 slip op. at 23 n. 13

(3rd Cir. August 27, 1985). The purpose of the operating license is to set the legal limitations under which the utility may operate the TMI Unit-1 nuclear reactor. It remains beyond dispute that TMI-1 can no longer be operated in accordance with the terms of the original license. The accident and the subsequent fraudulent acts committed by the Licensee clearly show that the terms of the original license could no longer guarantee the safety of the public with the restart of Unit-1.[8] The Commission recognized that the original license had become invalid. This necessitated holding hearings to determine if the imposition of certain restrictive conditions would be "necessary and sufficient to provide reasonable assurance" of safe operation of the facility. *Metropolitan Edison Co.*, (Three Mile Island Nuclear Station, Unit No. 1), CLI-78-9, 10 NRC 141, 148 (1979).

The NRC has found that only in accordance with these newly imposed conditions could the reasonable assurance of safety be met. The 155 new conditions attached to the Licensee's continued operation of the reactor materially affect the license. Therefore, the license has been amended requiring the hearing procedures of Sec. 189(a) of the AEA. The Commission and the Third Circuit panel attempt to avoid the stricter requirements of Sec. 189(a), by stating that the license is not amended because the Licensee is not permitted to do anything more than it previously has been allowed to do. *See, TMIA v. USNRC* Nos. 85-3301, 85-3302, 85-3310, 85-3315 slip op. at 22-23 (3rd Cir. August 27, 1985). This constitutes an attempt to avoid the necessary procedural due process concerns included in Sec. 189(a), through a simplistic operation of semantics. It is not crucial that an

8. The Commission must be satisfied that the operation of the nuclear reactor will not be "inimical to the . . . health and safety of the public before issuance of a license. 42 U.S.C. Sec. 2133(d) (1982); 10 C.F.R. Sec. 50.40(d) (1985). Absence of an assurance to such an effect will support revocation, suspension, or modification of the license. 10 C.F.R. Sec. 50.100 (1985).

amendment add to or detract from the ability of the Licensee to proceed in a certain manner.[9] Any fair understanding of the meaning of the word "amendment" would include the 155 newly imposed conditions on TMI-1's license.

The majority opinion attempts to avoid analyzing whether or not Sec. 189(a) hearing requirements attach to these issues. The majority of the Third Circuit panel refuses to admit that the 155 newly imposed conditions create nothing more than a simple lifting of the suspension of the original license, not a license amendment. Yet, both the Commission and the Licensee have previously admitted that the original operating license has been amended. *See TMIA v. USNRC Id.* (J. Adams Dissent). Although the majority states no authority for their proposition, they apparently rely on *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 751 F.2d 1287 (D.C. Cir. 1984). In that case, the court held that the lifting of a license suspension, alone, does not trigger a Sec. 189(a) hearing requirement. However, in that case the original license requirements were simply reimposed and did "nothing to alter the original terms of the license." *Id.* at 1314.

Other courts have also complained of the NRC's attempts to label license amendments as something other than a license amendment in order to avoid the notice and hearing requirements of Sec. 189(a). In *Sholly v. United States Nuclear Regulatory Commission*, 651 F.2d 780 (D.C. Cir. 1980), *vacated* 459 U.S. 1194

9. Amendment is defined as "[t]o change or modify for the better. To alter by modification, deletion, or addition." *Black's Law Dictionary*, 74 (5th Ed. 1979) The 155 newly imposed conditions certainly meet this linguistic requirement. These new conditions greatly modify the original license for the better, because they have added tremendously to the safe operation of Unit-1. They also meet the other criteria becasue they add to and modify the resrictions imposed on the operating license, while deleting the ability of the Licensee to operate its nuclear reactor as it did before the accident at Unit-2.

(1983), the court held that, "[g]iven that the original operating license was inapplicable, the NRC could not simply rely on its terms as authority for venting (radioactive gas from the damaged TMI-2 reactor building.) Authority for venting . . . therefore had to come in the form of a license amendment." *Id.* at 790.

The instant case does not involve a simple lifting of a license suspension. The restart order imposes a total of 155 new conditions on a nominally different Licensee. If the Licensee attemted to restart Unit-1 under its original license, it would be in violation of its new license. Therefore, the original license has been amended. This attempt to call the 155 new conditions not a license amendment is disingenuous at best. While there may be some situations in which the imposition of a few minor conditions would not amount to an amendment requiring a Sec. 189(a) hearing, this case obviously does not present that situation.

The NRC's and the Court of Appeals' use of a simplistic semantic ruse must not foreclose the full ajudication of all the remaining disputed issues from the constitutionally and statutorily mandated hearing requirements.

DID THE COURT OF APPEALS ERR IN GIVING TOO MUCH DEFERENCE TO THE NRC IN FINDING THAT THE COMMISSION'S REFUSAL TO REOPEN THE RECORD TO INCLUDE THE AAMODTS' HEALTH STUDY AND THE HARTMAN ALLEGATIONS DID NOT CONSTITUTE AN ABUSE OF THE COMMISSION'S DISCRETION?

The Court of Appeals applied an incorrect standard of review in examining the NRC's decisions. In reviewing an administrative agency's decision, the reviewing court normally grants the agency a great deal of deference in its decision-making process. However, the reviewing court owes no deference to a non-expert

determination by the NRC. *See, Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983). No special deference is owed to the NRC when it acts as a non-expert on a matter to which expertise is expected. A determination does not become a "scientific determination" because it only concerns a scientific matter. The determination becomes scientific only if it is made in a scientific manner. Some methods of proceedings are so unscientific that a reviewing court need not grant the agency any deference to that decision.

In the instant case, the NRC arbitrarily decided not to examine certain evidence, relying instead upon skeptical evidence provided by the Licensee, who has previously shown that it cannot be trusted to tell the whole truth on many issues. This behavior certainly constitutes unscientific reasoning worthy of greater judicial scrutiny. Also, Petitioners' issues revolve around questions of health and management integrity, both outside of the scope of the NRC's "expertise", and therefore, the reviewing court owes no special deference to these non-expert decisions.

The Court of Appeals also gave too much deference to the NRC, by failing to reopen the administrative record to examine the value of the evidence presented by Petitioners in their January 15, 1985 Motions to Reopen the Record. As a general rule, judicial review of an agency decision is based upon the administrative record. However, the reviewing court is empowered to look outside the administrative record when such record is incomplete and where substantial questions arise which cannot be resolved by the administrative record. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). *See also Environmental Defense Fund v. Costle*, 657 F.2d 275 (D.C. Cir. 1981). The Court of Appeals arbitrarily failed to exercise this duty by not examining the evidence presented by Petitioners as to both the health issues raised in the Aamodt's Health Study, and the management integrity issues presented in the

Hartman allegations. The Court of Appeals failed to examine the quality of the NRC's evidence even though Petitioners demonstrated the absence of reliable evidence through their January 15, 1985 motions to reopen the record to consider the crucial health issues contained in the Aamodt's Health Study.

The Court of Appeals applied an incorrect standard of review in not applying greater scrutiny of the NRC's non-expert determinations.

WHAT IS THE CORRECT STANDARD OF JUDICIAL REVIEW IN CASES WHERE AN ADMINISTRATIVE AGENCY DEPARTS FROM LONG-STANDING AGENCY RULES ENACTED TO COMPORT WITH CONSTITUTIONAL REQUIREMENTS OF PROCEDURAL DUE PROCESS?

Usually, Petitioners must show that the normal deference given to an adminstrative agency's expertise in such matters as falls within the confines of its responsibilities was unfounded, or that the agency acted in an arbitrary and capricious manner in respect to the particular decision. *See, Fidelity Federal Savings and Loan Assoc. v. de la Questa*, 498 U.S. 141 (1982) (Where Congress has directed administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily.) Petitioner will show that the entire restart process was filled with the Commission's overstepping its authority, or acting in an arbitrary or capricious manner.

The NRC has continually changed its rules of procedure, and then arbitrarily determined on what issues it would and would not hold hearings. It is insufficient balm to Petitioners, that the NRC has determined that no public hearings on these important issues are called for, because the Commission has adequately determined, on its own, that these issues do not require a full hearing.

This constitutes circular reasoning which should not be supported by the judiciary. However, the Court of Appeals concluded that these actions did not constitute arbitrary or capricious behavior worthy of heightened judicial scrutiny.

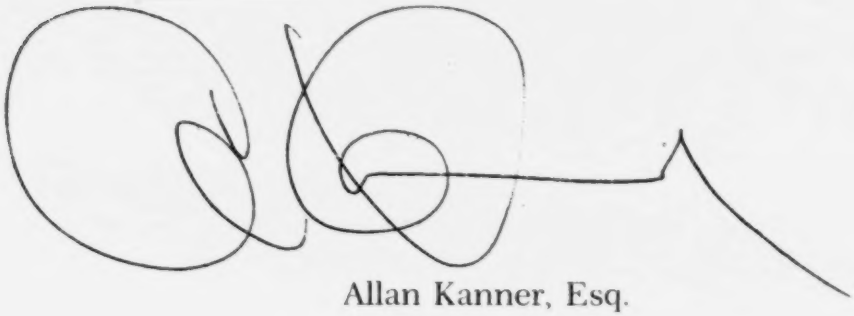
Different administrative actions require different standards of review. Generally the agency is given a large degree of discretion. The leading case on this issue is *Citizens to Preserve Overton Park, Inc. v. Volpe*, , 401 U.S. 402 (1971), which imposes an "arbitrary and capricious" test in order to overturn an agency's decision.

This Court has left open the question of whether "a totally unjustified departure from well-settled agency procedures of longstanding might require judicial correction." *Vermont Yankee Nuclear Power Corp., v. NRDC*, 435 U.S. 519, 542 (1978). The NRC's unjustified deviation from longstanding practices in many procedural elements of this case requires closer judicial scrutiny than applied by the Court of Appeals. The NRC began this deviation from longstanding procedure by violating their practice in imposing the 1979 Unit-1 shutdown order without holding a hearing on the matter as required by the agency rules. Then the NRC arbitrarily avoided characterizing their actions as a license amendment procedure, in order to escape the more stringent requirements of the AEA's Sec. 189(a). Also, the NRC has blatantly failed to consider the seriousness of the charges contained in the Hartmann Allegations before allowing the restart of Unit-1. These are just a few of the examples of the NRC's continued deviation from longstanding procedures in dealing with this extraordinary case.

In conclusion, this Court should grant Petitioner's writ of certiorari in order to answer the question of the proper standard of review to be imposed in examining an

administrative agency's departure from longstanding agency procedures designed to comport with constitutionally guaranteed rights to procedural due process.

Respectfully submitted,*



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